STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 8, 2010
v	No. 288577 Oakland Circuit Court
WILLIAM DAWSON OLSEN, Defendant-Appellee.	LC No. 2008-008818-AR

Before: Gleicher, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Defendant, a Pontiac police officer, was charged with two counts of assault and battery, MCL 750.81(1), arising from his use of a taser to stun two men while they were handcuffed during the execution of a search warrant. Defendant moved to suppress oral and written statements that he provided to the commanding officer of the search team regarding the incident and to dismiss the charges. The district court denied defendant's motion. Defendant appealed that decision to the circuit court, which reversed the district court's decision in its entirety. The prosecutor[1] appeals the circuit court's decision by leave granted. We reverse and remand.

Plaintiff argues that the circuit court erred in reversing the district court's denial of defendant's motion to suppress the oral and written statements that defendant provided to the commanding officer of the search team. We agree.

A circuit court, when sitting as an appellate court, generally reviews a district court's decision to deny a motion to suppress evidence under the standards applicable to a reviewing court. *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005). Thus, it reviews the district court's ultimate decision de novo and its findings of fact for clear error. *Id.* Deference is given to the district court's determination of credibility issues. *Id.* The determination whether a defendant's statement was voluntarily made is subject to an independent determination by the reviewing court, but the district court's decision should be affirmed unless the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 352-353. We

[1] Although the charges were brought in Oakland County, a special prosecutor from the Washtenaw County Prosecutor's Office is prosecuting the case.

consider the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made. *People v Sexton* (*After Remand*), 461 Mich 746, 752; 609 NW2d 822 (2000).

We similarly review the circuit court's decision de novo because it must be determined on appeal whether the district court's decision was erroneous. *People v Flowers*, 191 Mich App 169, 174; 477 NW2d 473 (1991) (this Court reviews a circuit court's review of a district court's bindover decision de novo). Constitutional issues are also reviewed de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

Defendant's motion to suppress was principally based on *Garrity v New Jersey*, 385 US 493, 500; 87 S Ct 616; 17 L Ed 2d 562 (1967), in which the United States Supreme Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." Under *Garrity*, the critical question is whether a police officer was deprived of his free choice to admit, deny, or refuse to answer questions. *Id.* at 496. It is founded on an individual's Fifth Amendment privilege "'not to answer official questions put to him in any other proceedings, civil or criminal, formal or informal, where the answers might incriminate the individual in future criminal proceedings.'" *People v Wyngaard*, 462 Mich 659, 671-672; 614 NW2d 143 (2000), quoting *Minnesota v Murphy*, 465 US 420, 426; 104 S Ct 1136; 79 L Ed 2d 409 (1984). The state is precluded from imposing substantial penalties against an individual for exercising the Fifth Amendment privilege. *Id.* at 673. The privilege only applies to compulsions from official coercion. *Id.* at 672. "[I]t 'is not concerned "with moral or psychological pressures to confess emanating from sources other than official coercion."'" *Id.*, quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986).

Having considered the totality of the circumstances, we are not left with a definite and firm conviction that the district court erred in denying defendant's motion to suppress his statements. The record supports the district court's determination that the statements were not the product of a direct threat that defendant's employment would be terminated if he chose not to answer the commanding officer's questions or comply with the commanding officer's directive to provide a written statement. Although we find merit to defendant's argument that a threat of employment consequences other than termination could also call for the application of *Garrity*, the threat must be substantial. *United States ex rel Sanney v Montanye*, 500 F2d 411, 415 (CA 2, 1974); see also *Wyngaard*, *supra* at 673. "It must amount to a choice 'between the rock and the whirlpool.'" *Montanye*, *supra* at 45, quoting *Garrity*, *supra* at 498. In this case, there is no evidence of a direct threat of any employment consequences made by the commanding officer, Pontiac Police Lieutenant Robert Miller. In the absence of a direct threat, we must consider whether the objective circumstances show that defendant was deprived of a free choice to remain silent, and not merely whether defendant subjectively believed that he was compelled to give a statement based on a threat of adverse employment consequences. *United States v Vangates*, 287 F3d 1315, 1321-1322 (CA 11, 2002).

Miller testified that his initial inquiry of defendant at the scene was prompted by his own observations of seeing defendant use the taser against the restrained individuals. Viewed objectively, while the confrontation might have caused defendant to feel psychologically pressured to say something to explain his behavior, there was no evidence that Miller had the

authority to fire or discipline defendant for not answering his questions. The mere existence of a code of conduct within the police department that could subject a police officer to disciplinary action for failure to comply with a superior officer's direct order to answer questions is insufficient to establish that defendant's statement was involuntary. *People v Coutu* (*On Remand*), 235 Mich App 695, 703-704; 599 NW2d 556 (1999).

Further, the fact that a different officer testified at the suppression hearing that he was aware of one incident in 1996 when a police officer was terminated for disobeying an unspecified order does not compel a different result. Aside from the absence of any evidence that defendant was aware of this incident, the testimony does nothing to call into question the evidence that a failure to obey an order is not subject to a particular sanction. Indeed, Miller testified that the totality of the circumstances is considered to determine an appropriate sanction for a code violation. With respect to his decision to answer Miller's questions, defendant indicated that "[i]f I would have known it would have led to my demise, I surely would have stopped and had representation and I would not have followed his direct order."

The totality of the circumstances does not show that defendant was forced to choose between invoking his right to remain silent and his job. No particular disciplinary action related to his failure to answer questions was imminent. Therefore, the district court did not err in denying defendant's motion to suppress the oral statement. We reach this same conclusion with respect to defendant's decision to comply with Miller's later directive that he prepare a written statement. Giving deference to the district court's finding that Miller did not make an overt threat of employment termination, the court did not err in denying defendant's motion to suppress the written statement.

Plaintiff also argues that the circuit court erred in reversing the district court's decision denying defendant's motion to dismiss the charges. We agree. The sole basis for defendant's motion at the suppression hearing was the special prosecutor's exposure to statements that defendant made during an internal police investigation, which the special prosecutor had received from a Michigan State Police detective approximately a week and a half before the suppression hearing.

In considering whether the exposure required dismissal, we begin by noting that although the parties did not dispute that defendant gave statements during the internal police investigation that were protected by *Garrity*, there was no evidence that governmental misconduct related to defendant's constitutional rights occurred in procuring the statements. "[A] *Garrity* hearing allows 'the interviewee to answer questions with the knowledge that any statements elicited therein will not be used against him in criminal proceedings.'" *People v Brown*, 279 Mich App 116, 142-143; 755 NW2d 664 (2008), quoting *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 115 n 2; 607 NW2d 742 (1999). Further, only a prosecutor's use of the statements in a criminal proceeding against the officers, and not the exposure to the statements, implicates an officer's Fifth Amendment rights. *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 509; 671 NW2d 570 (2003).

In general, the exclusionary rule requires exclusion of involuntary statements and the fruits of that evidence. *People v Robinson*, 48 Mich App 253, 259-260; 210 NW2d 372 (1973). The prosecution bears the burden of demonstrating that all the evidence that it seeks to introduce was developed from a source wholly independent of the involuntary statements. *Id.* at 260. "In

essence, the privilege against self-incrimination affords a form of use immunity which, absent waiver, automatically attaches to compelled incriminating statements as a matter of law." *Hester v Milledgeville*, 777 F2d 1492, 1496 (CA 11, 1985); see also *Kastigar v United States*, 406 US 441, 462; 92 S Ct 1653; 32 L Ed 2d 212 (1972) (federal immunity statute leaves a witness claiming immunity in substantially the same position as if the witness had claimed the Fifth Amendment privilege).

Although the district court in this case did not recognize that *Garrity*-protected statements present a form of use immunity, it did consider whether there were any circumstances that warranted further inquiry into whether the special prosecutor had tainted evidence. The circumstances presented to the district court regarding the prosecutor's exposure to the statements do not provide any basis for disturbing the court's decision that further inquiry was not warranted. Further, the district court reached the right result in denying the motion to dismiss the charges.

Even the exclusion of evidence as a remedy to sanction and deter governmental misconduct that has resulted in a violation of a defendant's constitutional rights should only be used as a last resort. See *People v Frazier*, 478 Mich 231, 247-251; 733 NW2d 713 (2007). The exclusionary rule does not act as a personal constitutional right of an aggrieved defendant. *Id.* at 248. Here, nothing in the record suggests that the special prosecutor developed any evidence from her exposure to defendant's statements during the short period preceding the suppression hearing. Further, although we are not bound by decisions of the federal circuit courts, *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), as in *United States v Serrano*, 870 F2d 1, 17-18 (CA 1, 1989), we reject the notion that a prosecution is foreclosed simply because an involuntary or "immunized" statement might tangentially influence the special prosecutor's thought processes. Nor does exposure to the statement necessarily require disqualification of the special prosecutor. *United States v Daniels*, 281 F3d 168, 181-182 (CA 5, 2002).

Because the circumstances presented to the district court in this case indicated nothing more than the special prosecutor's exposure to defendant's statements, defendant was not entitled to dismissal. Therefore, we reverse the circuit court's decision reversing the district court's denial of the motion to dismiss. We express no opinion concerning whether other circumstances might arise on remand that might warrant dismissal or some other lesser remedy.[2]

[2] To the extent that defendant relies on the Disclosures by Law Enforcement Act, MCL 15.391 *et seq.*, which became effective December 29, 2006, this issue is not properly before us because it was not raised below or considered by the lower courts. *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006). In any event, we are not persuaded that this case would be resolved differently if MCL 15.393, rather than constitutional principles, were applied.

Reversed and remanded to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder